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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/027,265	12/21/2001	Rosann Marie Matthews Kaylor	16,976	3108
23556 7590 12/16/2009 KIMBERLY-CLARK WORLDWIDE, INC. Tara Pohlkotte 401 NORTH LAKE STREET NEENAH, WI 54956				
EXAMINER FOREMAN, JONATHAN M				
ART UNIT		PAPER NUMBER		
3736				
MAIL DATE		DELIVERY MODE		
12/16/2009		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ROSANN MARIE MATTHEWS KAYLOR,  
DENNIS STEIN EVERHART, JEFFREY DEAN LINDSAY  
and JASON PATRICK McDEVITT

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Appeal 2009-004376  
Application 10/027,265  
Technology Center 3700

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Decided: December 16, 2009

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Before ALLEN R. MACDONALD, *Vice Chief Administrative Patent Judge*,  
JENNIFER D. BAHR and STEVEN D.A. McCARTHY, *Administrative  
Patent Judges*.

McCARTHY, *Administrative Patent Judge*.

DECISION ON APPEAL

- 1           The Appellants appeal under 35 U.S.C. § 134 from the Examiner's  
2   decision finally rejecting:

claims 41, 43 and 75 under 35 U.S.C. § 102(b) as being  
anticipated by Smith (US 4,327,744, issued May 4, 1982);  
claims 41, 43-45 and 75 under § 102(b) as being  
anticipated by Roth (US 4,920,974, issued May 1, 1990);  
claims 41, 43, 51, 53, 56, 57, 75, 77 and 79 under  
§ 102(b) as being anticipated by Anaplotis (US 6,123,676,  
issued Sep. 26, 2000);  
claim 78 under § 102(b) as being anticipated by Bora  
(US 4,335,731, issued Jun. 22, 1982);  
claim 79 under § 102(b) as being anticipated by Ubersax  
(US 3,672,351, issued June 27, 1972);  
claims 41, 43, 46, 48 and 76 under 35 U.S.C. § 103(a) as  
being unpatentable over Kreiser (US 2004/0092843 A1, publ.  
May 13, 2004) and Dreibelbis (US 5,728,340, issued Mar. 17,  
1998);  
claims 44, 45, 54 and 55 under § 103(a) as being  
unpatentable over Anaplotis and Forte (US 6,114,024, issued  
Sep. 5, 2000);  
claims 49 and 50 under § 103(a) as being unpatentable  
over Kreiser, Dreibelbis and Forte; and  
claim 58 under § 103(a) as being unpatentable over  
Anaplotis and Lawrence (US 5,660,790, issued Aug. 26,  
1997).

The Examiner has withdrawn claims 1-40, 42, 47, 52 and 59-74 from  
consideration.

We REVERSE.

1 Claim 41 is typical of the claims on appeal:

2 41. A method for collecting a sample  
3 from a test subject, the method comprising:  
4 providing a device adapted to capture and  
5 retain the sample, wherein the device includes a  
6 generally tubular nonwoven body including a  
7 generally tubular inner surface defined by an  
8 interior layer, the inner surface defining a pocket  
9 therewithin, the pocket having a distal end and a  
10 proximal end, the distal end being generally closed  
11 and the proximal end being generally open, the  
12 proximal end being configured to allow the  
13 insertion of a finger into the pocket through the  
14 proximal end, and a generally tubular outer  
15 surface;  
16 inserting a finger into the pocket; and  
17 contacting the sample with the device.

18 Independent claim 41 recites a method for collecting a sample from a  
19 test subject including a first step of providing a device adapted to capture  
20 and retain a sample. Independent claims 46 and 51 recite methods for  
21 analyzing a sample, each method including a first step of providing a device  
22 adapted to capture and retain a sample. The device provided in the first step  
23 of each method “includes a generally tubular nonwoven body.”

24 The Appellants formally define the term “nonwoven web” in the  
25 Specification as referring to “a web having a structure of individual fibers or  
26 threads that are interlaid, but not in an identifiable manner as in a knitted  
27 fabric.” (Spec. 6, ll. 16-18). Since the noun “web” appears in the formal  
28 definition, the intent of this definition appears to be to limit the scope of the  
29 adjective “nonwoven.”

As the Examiner points out, however, claims 41, 46 and 51 recite that the device provided in the first step of each method includes a generally tubular “nonwoven body” rather than a generally tubular nonwoven web. (See Ans. 10-11). While the term recited in claims 41, 46 and 51 is not identical to the term formally defined in the Specification, the formal definition in the context of the present Specification and claims shows an intent on the part of the Appellants to disclaim any interpretation of the term “generally tubular nonwoven body” broad enough to encompass generally tubular bodies other than bodies having structures of individual fibers or threads that are interlaid, but not in an identifiable manner as in a knitted fabric. To interpret the term “nonwoven body” more broadly would result in inconsistent interpretations of the adjective “nonwoven” as used in the claims and the Specification depending on which noun the adjective modifies.

With respect to the rejection of independent claim 41 and its dependent claims 43 and 75 as being anticipated by Smith; the rejection of claim 41 and its dependent claims 43-45 and 75 as being anticipated by Roth; the rejection of independent claim 41 and its dependent claims 43 and 75 as being anticipated by Anapliotis; and the rejection of independent claim 51 and its dependent claims 53, 56, 57 and 77 as being anticipated by Anapliotis,<sup>1</sup> the Appellants contend that neither Smith nor Roth nor Anapliotis discloses providing a device including a generally tubular nonwoven body. (Br. 4-6).

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<sup>1</sup> The rejection of claim 79 under § 102(b) as being anticipated by Anapliotis will be addressed separately.

Smith discloses a device for self-collection of cervical cell specimens. (Smith, col. 2, ll. 40-43). Smith describes the device as including a tubular finger member 12 “formed of a thin elastically resilient material such as an elastic silicone latex of the type commonly used to form surgical gloves.” (Smith, col. 2, ll. 53-56; *see also id.*, col. 1, ll. 50-57). The Examiner finds that Smith’s tubular finger member 12 is a generally tubular nonwoven body. (*See* Ans. 4).

Roth discloses a device for obtaining cervical cell culture specimens. (Roth, col. 2, ll. 8-12). The device includes an elastically flexible sheath. (Roth, col. 3, ll. 4-7). Roth discloses that the sheath is “typically fabricated from an inexpensive, water-impermeable rubbery material such as natural rubber (latex) or a synthetic material such as polyurethane or the like.” (Roth, col. 3, ll. 13-16). The Examiner finds that Roth’s device is a generally tubular nonwoven body. (*See* Ans. 4 and 11-12).

Anapliotis discloses a slip-on, elastic protective clothing article taking the form of a finger stall 14 for use during a medical examination. (Anapliotis, col. 1, ll. 51-54 and col. 4, ll. 21-23). A diagnostic strip 18 secured to the finger stall 10 by double-sided adhesive strip measures the pH of endogenous fluids during the examination. (Anapliotis, col. 4, ll. 43-49 and 60-62). Anapliotis describes the protective clothing article 10 as “preferably made of polyethylene, since a particularly good adhesion is attainable with this material in a simple manner between the diagnostic strip and protective clothing article by means of a two-sided adhesive strip . . . .” (Anapliotis, col. 4, ll. 33-37). The Examiner finds that Anapliotis’ protective clothing article 10 is a generally tubular nonwoven body. (*See* Ans. 5 and 12).

Smith's description of Smith's device *12*; Roth's description of the sheath *12*; and Anapliotis' description of the protective clothing article *10* are each consistent with tubular members formed of continuous polymeric sheet or film materials rather than from interlaid fibers. Since the passages of Smith, Roth and Anapliotis on which the Examiner relies do not expressly or inherently describe generally tubular nonwoven bodies, and since the Examiner identifies no other passage of Smith, Roth or Anapliotis which might describe providing such a body, the Appellants have shown that the Examiner erred in rejecting claims 41, 43 and 75 under § 102(b) as being anticipated by Smith; in rejecting claims 41, 43-45 and 75 under § 102(b) as being anticipated by Roth; and in rejecting claims 41, 43, 51, 53, 56, 57, 75 and 77 under § 102(b) as being anticipated by Anapliotis.

With respect to the rejections of independent claim 41 and its dependent claim 43, and of claim 46 and its dependent claims 48 and 76, as being unpatentable over Kreiser and Dreibelbis, the Appellants contend that Kreiser and Dreibelbis, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 7). With respect to the rejection of claims 49 and 50, which each depend from independent claim 46, the Appellants contend that Kreiser, Dreibelbis and Forte, alone or in combination, would not have provided one of ordinary skill in the art reason to provide a device including a generally tubular nonwoven body. (Br. 8).

Kreiser discloses a hand-mounted device *100* for obtaining a sample of blood from the scalp of a fetus and for measuring the pH of the blood sample. The pH measuring device includes a lancet *106* slidably received in a lancet guide tube *108* for accessing the sample of blood and a capillary *116*

slidably received in a capillary guide tube 118 for collecting the sample.  
Kreiser discloses mounting the lancet guide tube 108 and the capillary guide tube 118 on a finger cot or surgical glove. (Kreiser 1-2, para. 0016-17).

Dreibelbis discloses fabricating a tear-resistant surgical glove by dipping a mandrel into a degassed solution of polyester-urethane-urea prepolymer. (Dreibelbis, col. 2, ll. 19-54; *see also id.*, Abstract). The Examiner concludes that it would have been obvious “to form the tubular body as disclosed in Kreiser et al. from a nonwoven elastic material as taught by Dreibelbis et al. in order to make the tubular body more resistant to punctures and tearing (See Abstract).” (Ans. 8).

Forte discloses a breathable (that is, moisture vapor transporting) polymer film material providing an effective barrier against microorganisms and bodily fluids. (Forte, col. 5, ll. 4-9; *see also id.*, col. 1, ll. 28-33). Forte describes fabricating the film material by simultaneously extruding and then stretching a five-layer polymer film including a microporous core layer; two outer monolithic layers containing hydrophilic polymer resin; and microporous adhesive layers for bonding the outer layers to the opposite sides of the core layer. (See Forte, col. 3, l. 48 – col. 4, l. 10). Forte teaches the use of the film material in gloves. (Forte, col. 1, ll. 34-37). The Examiner concludes that it would have been obvious “to modify the device as disclosed by Kreiser et al. in view of Dreibelbis et al. to include a material that is substantially impermeable to liquids yet breathable to water vapor as taught by Forte in order to allow the body of the user to cool naturally.” (Ans. 9).

Kreiser does not appear to disclose the material from which Kreiser’s finger cot is made. Dreibelbis’ method for fabricating a glove is consistent



1 with the fabrication of a glove consisting of a continuous polymeric film or  
2 sheet material rather than a material formed from interlaid fibers. The  
3 reasoning articulated by the Examiner in support of the rejections of claims  
4 41, 43, 46, 48 and 76 as being unpatentable over Kreiser and Dreibelbis fails  
5 to explain why one of ordinary skill in the art would have wished to  
6 fabricate Kreiser's finger cot as a nonwoven body and consequently fails to  
7 adequately support the legal conclusion of obviousness. The Appellants  
8 have shown that the Examiner erred in rejecting claims 41, 43, 46, 48 and 76  
9 under § 103(a) as being unpatentable over Kreiser and Dreibelbis.

10 With respect to the rejection of claims 49 and 50, Forte's extruded and  
11 stretched multilayer polymeric material is not a nonwoven material. The  
12 Examiner fails to articulate reasoning sufficient to explain how Forte might  
13 make up the deficiencies of the combined teachings of Kreiser and  
14 Dreibelbis. The Appellants have shown that the Examiner erred in rejecting  
15 claims 49 and 50 under § 103(a) as being unpatentable over Kreiser,  
16 Dreibelbis and Forte.

17 With respect to the rejections of dependent claims 44 and 45, each of  
18 which depends from independent claim 41, and of claims 54 and 55, each of  
19 which depends from independent claim 51, the Appellants contend that  
20 Anaplotis and Forte, alone or in combination, would not have provided one  
21 of ordinary skill in the art reason to provide a device including a generally  
22 tubular nonwoven body. (Br. 7-8). With respect to the rejection of claim  
23 58, which depends from independent claim 51, the Appellants contend that  
24 Anaplotis and Lawrence, alone or in combination, would not have provided  
25 one of ordinary skill in the art reason to provide a device including a  
26 generally tubular nonwoven body. (Br. 8).

Lawrence discloses a pH test device including a pH indicator lamina formed over the surface of a substrate lamina. (Lawrence, col. 7, ll. 49-51). Lawrence's pH indicator lamina changes color when exposed to a bodily fluid to indicate the pH of the fluid. (Lawrence, col. 7, l. 57 – col. 8, l. 18). Lawrence teaches reading the color change either visually or by use of a machine. (Lawrence, col. 12, ll. 14-19). The pH indicator layer of Lawrence's pH test device consists of a pH indicator immobilized in a solid polymer matrix. (Lawrence, col. 3, ll. 36-39).

As noted earlier, Anapliotis' description of Anapliotis' protective clothing article 10 is consistent with tubular members formed of continuous polymeric sheet or film materials rather than from interlaid fibers. The Examiner has not articulated reasoning explaining how Forte or Lawrence overcomes this deficiency in the teachings of Anapliotis. With respect to the rejection of claims 44, 45, 54 and 55, the Examiner reasons that it would have been obvious "to modify the device as disclosed by Anapliotis to include a material that is substantially impermeable to liquids yet breathable to water vapor as taught by Forte in order to allow the body of the user to cool naturally." (Ans. 8). With respect to the rejection of claim 58, the Examiner reasons that it would have been obvious "to modify the method as disclosed by Anapliotis to include the step of observing the reaction using a reader as taught by Lawrence et al. in order to more precisely quantify the reaction" of a pH indicator exposed to a bodily fluid. (Ans. 9). Neither reason explains why one of ordinary skill in the art would have wished to fabricate Anapliotis clothing article as a nonwoven body. The Appellants have shown that the Examiner erred in rejecting claims 44, 45, 54 and 55 under § 103(a) as being unpatentable over Anapliotis and Forte. The

1 Appellants also have shown that the Examiner erred in rejecting claim 58  
2 under § 103(a) as being unpatentable over Anapliotis and Lawrence.

3 Claim 78 recites a method for collecting a sample from a test subject.  
4 The method includes providing a finger glove device adapted to capture and  
5 retain the sample. The finger glove device includes a generally tubular body  
6 comprising a first panel thermally bonded to a second panel. The first panel  
7 comprises “a non-elastic material containing a nonwoven web.” The second  
8 panel comprises “an elastic nonwoven material.” The Appellants’ formal  
9 definition of the term “nonwoven web” in the Specification shows an intent  
10 on the part of the Appellants to disclaim any interpretation of the term  
11 “nonwoven material” broad enough to encompass materials other than those  
12 having structures of individual fibers or threads that are interlaid, but not in  
13 an identifiable manner as in a knitted fabric.

14 With respect to the rejection of claim 78 as being anticipated by Bora,  
15 the Appellants contend that Bora fails to disclose a generally tubular body  
16 including a first panel comprising a material containing a nonwoven web  
17 and a second panel comprising a nowoven material. (Br. 6-7). Bora  
18 discloses a dental wipe for cleaning teeth. The dental wipe takes the form of  
19 a finger cot 32 including a “U” shaped sheet 34 and a sheet 36. The “U”  
20 shaped sheet 34 and the sheet 36 are secured together at their edges by heat  
21 sealing with a sheet 38 between them. The three sheets together form a  
22 finger stall. (Bora, col. 3, ll. 20-25). Bora discloses that the sheets 34 and  
23 36 are “flexible reticulated polyurethane foam or flexible non-reticulated  
24 polyurethane foam or a combination of both. Sheet 38 is substantially firmer  
25 than sheets 36 and 38 [*sic*, sheets 34 and 36] and of, for example, a firm  
26 polymeric material.” (Bora, col. 3, ll. 25-30). The Examiner finds that

1 Bora's sheet 38 is a first panel and that Bora's "U" shaped sheet 38 is a  
2 second panel. (*See* Ans. 6 and 13).

3 Bora's description of the sheet 38 is consistent with a sheet or panel  
4 formed of a polymeric sheet or film material rather than a nonwoven  
5 material. Bora describes the "U" shaped sheet 34 as made from a flexible  
6 reticulated polyurethane foam rather than a nonwoven material. The  
7 Examiner articulates no technical reasoning sufficient to provide a sound  
8 basis for belief that the structure or properties of Bora's flexible reticulated  
9 polyurethane foam are identical to the structure or properties of any  
10 nonwoven material. Since the passage of Bora on which the Examiner relies  
11 does not expressly or inherently describe the two panels recited in claim 78  
12 and since the Examiner identifies no other passage of Bora which might  
13 describe such panels, the Appellants have shown that the Examiner erred in  
14 rejecting claim 78 under § 102(b) as being anticipated by Bora.

15 Claim 79 recites a method for analyzing a sample. The method  
16 includes providing a device adapted to capture and retain the sample. The  
17 device includes a generally tubular body comprising a first panel attached to  
18 a second panel. The second panel comprises "an elastic nonwoven  
19 material," that is, a material having structures of individual fibers or threads  
20 that are interlaid, but not in an identifiable manner as in a knitted fabric.

21 With respect to the rejection of claim 79 as being anticipated by  
22 Anapliotis, the Appellants contend that Anapliotis does not disclose a  
23 generally tubular elastic nonwoven. (Br. 5-6). With respect to the rejection  
24 of claim 79 as being anticipated by Ubersax, the Appellants contend that  
25 Ubersax fails to disclose a generally tubular body including a second panel  
26 comprising a nonwoven material as recited in claim 79. (Br. 6). Ubersax

discloses a device including “a glove of an impermeable material, such as rubber or other elastic or plastic material.” (Ubersax, col. 1, ll. 29-33). A test patch impregnated with an indicator composition is affixed to the distal end of the thumb portion of the glove *I*. (*Id.*; Ubersax, col. 1, ll. 34-36). The Examiner finds that Ubersax’s glove *I* is the second panel recited in claim 79. (*See* Ans. 6 and 13).

Anapliotis’ description of Anapliotis’ protective clothing article *10* and Ubersax’s description of the glove *I* are each consistent with a structure formed from a polymeric sheet or film material rather than a nonwoven material. Since the passages of Anapliotis and Ubersax on which the Examiner relies do not expressly or inherently describe the second panel recited in claim 79 and since the Examiner identifies no other passage of Anapliotis or Ubersax which might describe such a panel, the Appellants have shown that the Examiner erred in rejecting claim 79 under § 102(b) as being anticipated by either one of Anapliotis and Ubersax.

#### DECISION

We REVERSE the Examiner’s decision rejecting claims 41, 43-46, 48-51, 53-58 and 75-79.

#### REVERSED

Klh

KIMBERLY-CLARK WORLDWIDE, INC.  
TARA POHLKOTTE  
401 NORTH LAKE STREET  
NEENAH WI 54956